# APPENDIX

## First Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 423-26—September Term, 1968.

(Argued April 8, 1969 Decided May 19, 1969.)

Docket Nos. 32884-87

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BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

*Plaintiffs-Appellants,*

—v.—

CURTISS-WRIGHT CORPORATION,

*Defendant-Appellee.*

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Before:

FRIENDLY, KAUFMAN *and* HAYS,

*Circuit Judges.*

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Appeals from a judgment and an order of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* (1) dismissing the com-

plaints of plaintiffs in their actions in negligence, implied warranty and express warranty, arising out of an airplane crash and (2) denying plaintiff Braniff's motion to amend its complaint by adding as plaintiffs the flight crew of the airplane.

Reversed and remanded for trial on the negligence claims of Braniff and Berg's estate, otherwise affirmed.

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WILBUR E. DOW, JR., New York, New York (Dow, Stonebridge & Wallace, New York, New York), *for Appellants Braniff and Addabbo.*

W. SHELBY COATES, JR., New York, New York, *for Appellant Stein.*

JAMES F. COUGHLIN, New York, New York (Mendes and Mount, New York, New York, Ernest D. Kennedy, of counsel, *for Appellee.*

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HAYS, *Circuit Judge:*

Braniff Airways, Inc., Phillip Addabbo, and Morton D. Stein, as executor of the estate of Maurice Berg, appeal from a judgment of the United States District Court for the Southern District of New York dismissing their complaints in actions against Curtiss-Wright Corporation arising out of an airplane crash that occurred near Miami, Florida on March 25, 1958. Braniff also appeals from an order denying its motion to amend its complaint by adding as plaintiffs the flight crew of the airplane.

Braniff was the airline operating the plane which crashed. Addabbo and Berg[1] were passengers on the plane.

The gravamen of the complaints is that the crash was caused by the failure of an engine manufactured by defendant. Defendant sold the engine to Douglas Aircraft Co. about July 17, 1956; Douglas installed it in a Douglas DC-7C aircraft which it sold to Braniff and delivered on October 23, 1956. Sometime later Braniff removed the engine from this aircraft and installed it in the right inboard position of the Douglas DC-7C which crashed.

Braniff's action is based upon negligence and also breach of both express and implied warranty. Berg sued originally only on the ground of negligence. Later he commenced a separate action in implied warranty, his motion for leave to amend his complaint to assert that claim in the negligence action having been denied. *Berg* v. *Curtiss-Wright*, 224 F.Supp. 236 (S.D.N.Y. 1963). Addabbo also sues on implied warranty. The cases were consolidated for trial together with certain related actions.[2] A jury trial was had, limited by agreement to the issue of liability.

At the end of the plaintiff's case, Curtiss-Wright made several motions which the court collectively treated as a motion pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for a directed verdict. Curtiss-Wright also sought dismissal of the implied warranty claims on the ground that they were barred by the statute of limitations. The court directed a verdict for Curtiss-Wright on the issues of negligence and breach of warranty. It held that the

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[1] Berg died in the course of the litigation and Stein, executor of his estate, was substituted.

[2] One of the related actions was a suit by Braniff against Douglas; it was discontinued during the trial.

claims of Berg and Addabbo based on implied warranty were barred by the statute of limitations.

We reverse the determination of the district court as to the claims sounding in negligence, holding that there was sufficient evidence of defendant's negligence to require submission of that issue to the jury. In all other respects we affirm.

I.

We are persuaded that there was sufficient evidence of Curtiss-Wright's negligence to take the case to the jury.

Examination of the engine in question after the crash revealed that the number eleven cylinder had failed, that it had separated from the engine, and that its wall was scuffed. A Curtiss-Wright employee testified that the cylinder wall showed evidence of "ladder cracking." There was testimony that overheating of a cylinder can cause scuffing and that scuffing can lead to ladder cracking and eventually to cracking of the cylinder barrel and its separation from the engine. A letter that Curtiss-Wright wrote to Braniff after the crash stated that the "cylinder barrel failures" occurring in the Curtiss-Wright engines were "apparently the result of high combustion chamber temperatures."

The evidence of Curtiss-Wright's negligence included the following:

(1) Curtiss-Wright increased the rating of the engines of this so-called E A series (the type of engine involved here) from the 3250 horsepower of the predecessor D A series to 3400 horsepower. Gregory, an independent engineering consultant, testified that the increase in horsepower raised the temperature in the cylinders, aggravating

the scuffing problem and greatly affecting the reliability of the engine. He stated that a reasonable horsepower to take from the engine would have been 3250 rather than 3400.

(2) Curtiss-Wright admitted that the fuel injection pump timing used in the type of engine involved in the crash had caused cylinder temperatures higher than those occurring in a similar Curtiss-Wright engine that used a different timing.

(3) Gregory testified that the use of flexible fuel lines of different lengths to take fuel to the various cylinders caused the cylinders to receive unequal amounts of fuel, resulting in a "large variation" in the temperatures of the cylinders which produced scuffing in the high temperature cylinders.

(4) Gregory testified that the high temperatures in the cylinder caused its separation and Ahlers, another expert witness, testified that the failure of the cylinder caused the crash.

There was evidence that Curtiss-Wright was aware of the scuffing difficulty and knew of instances of cylinder barrel separation by July 26, 1957, nearly eight months before the crash, but took no effective action to remedy the problem.

In reaching our conclusion that there was sufficient evidence of Curtiss-Wright's negligence to require submission of the case to the jury, we do not find it necessary to adopt the rule of *Noel* v. *United Aircraft Corp.*, 342 F. 2d 232 (3d Cir. 1964), that a manufacturer is under a continuing duty to improve its product where "human safety" is involved. It is clear that after such a product has been sold and dangerous defects in design have come

to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger.

II.

Curtiss-Wright contends that Braniff was contributorily negligent as a matter of law.

The principal basis for Curtiss-Wright's position is Braniff's admission that "on or about July 8, 1959, [Braniff] made a determination upon information then available that Captain Thomas Donald George [the pilot] was responsible for the accident . . ." and that it discharged him on this ground. There is no reason to believe that in holding the pilot "responsible" Braniff was applying the standard of care imposed by law. The admission states that the determination of responsibility was based on information available to Braniff by July 8, 1959. That date was more than eight months before the commencement of this action. Braniff may well have acquired further information during that period. The admission was merely evidence of contributory negligence which Braniff could seek to rebut at trial.

It is not necessary to record in detail certain other evidence of contributory negligence. We are convinced that all of this evidence presented an issue for the jury.

III.

We hold that the causes of action of Braniff, Addabbo and Berg based upon implied warranty are all barred by the statute of limitations. This makes it unnecessary for us

to discuss the district court's decision to direct a verdict against Braniff on that cause of action.

Under the New York law, the action by Braniff, an Oklahoma corporation, was untimely if it was barred by either the laws of New York or the laws of Florida. New York Civil Practice Law and Rules §202 (McKinney 1963).[3]

The action was not timely under the Florida statute of limitation, Fla. Stat. §95.11(4)(e)(1967), as construed in *Creviston* v. *General Motors Corp.*, 210 S. 2d 755 (Fla. Dist. Ct. App. 1968)—a case of which the district court was apparently unaware when it ruled that the action was timely. *Creviston* holds that the period of limitation in an implied warranty action is three years and that the action accrues at the time of sale. We believe that New York would accept the holding of the Florida appellate court in *Creviston* as representing the law of Florida, particularly since it is in accord with New York law as to accrual of the cause of action. (See *infra.*) The engine was sold in 1956; therefore commencement of the suit in 1960 was not timely.

Berg and Addabbo were both New York residents; their implied warranty actions were thus subject to New York's six year statute of limitation. New York Civil Practice Law and Rules §§213(2), 202 (McKinney 1963). Under New York law, these actions accrued at the time of the sale in 1956. See *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y. 2d 212, 215, 237 N.Y.S. 2d 714, 716, modified, 12 N.Y. 2d 1073, 239 N.Y.S. 2d 896, cert. denied, 374

[3] That Florida is the state where the cause of action accrued for purposes of N.Y. C.P.L.R. §202 (McKinney 1963) is not contested.

U.S. 808 (1963).[4] Since Berg commenced his action in 1963 and Addabbo commenced his in 1964, both actions were untimely. Nor would they be timely even if we were to accept the contention that the date of accrual is governed by Florida law; *Creviston* makes clear that Florida follows the New York rule.

## IV.

Braniff claims that Curtiss-Wright made express warranties concerning the engine in two pamphlets: "Facts about the Wright Turbo Compound" and an engineering report on the "TC18 Engine Operating Margin." The foreword to the former publication states that its purpose is to "explain the principles of the turbine system." On the cover of the engineering report is the statement: "This report is for information only and does not supersede, cancel, or change applicable engine specification or operating instructions." The statements in these two informational pamphlets are not warranties.

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[4] *Schwartz*, a case involving the sale and use of injurious medication, concerned the date of accrual of a negligence cause of action and an implied warranty cause of action; it held that the implied warranty action accrued at the time of sale and that the negligence action accrued when the medication was administered.

The *Schwartz* holding on implied warranty actions is not affected by the recent New York Court of Appeals 4-3 decision in *Flanagan* v. *Mount Eden General Hospital* (April 17, 1969) (not yet reported). *Flanagan* holds that in medical malpractice actions for negligence, involving the insertion of a foreign object into a patient's body, the cause of action does not accrue until the object is discovered. The court discussed *Schwartz* but was concerned only with its holding regarding the accrual of the negligence action. The court in *Flanagan* distinguished *Schwartz* and clearly limited *Flanagan's* application to foreign object malpractice cases.

V.

The district court denied Braniff's motion to amend its complaint by adding the members of the flight crew as plaintiffs. It appears that even if the requested amendment were made, the complaint would not state a cause of action on behalf of the crew. If that is the case, the denial was irrelevant. In any event, the motion in substance is one to permit the crew to intervene. Braniff could not properly make this motion; it must be made by the parties seeking to intervene. Rule 24(c), Federal Rules of Civil Procedure.

VI.

We wish to record our disapproval of the parties' disregard of the provisions of the Federal Rules of Appellate Procedure. Although Rule 30 does not require that the parties agree on the contents of an appendix, it explicitly requires the filing of a single appendix. The parties chose instead to file an appellants' appendix and an appellee's appendix. Thus, in order to consider a given witness' testimony in this highly technical case, it was necessary for us to jump from one appendix to the other. The rule requiring a single appendix was adopted to facilitate our task of judicial review.

Appellants also failed to reproduce in their Appendix the two pamphlets, Exhibits 5 and 15A, on which they rely to establish a cause of action for breach of express warranty.

Litigants are advised to consider these remarks as a warning of the possibility of more drastic action by the court in the future.

Affirmed as to all issues except the causes of action for negligence; as to these reversed and remanded for a new trial.

## Order Following Petition for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

32884-87

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BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

*Plaintiffs-Appellants,*

—v.—

CURTISS-WRIGHT CORPORATION,

*Defendant-Appellee,*

(and 3 other cases).

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A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
*Chief Judge*

June 13 1969

## Order Following Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

32884-87

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BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

*Plaintiffs-Appellants,*

—v.—

CURTISS-WRIGHT CORPORATION,

*Defendant-Appellee,*

(and 3 other cases).

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A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
*Chief Judge*

June 13 1969

## Second Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 423-26—September Term, 1968.

(Decided April 16, 1970.)

Docket Nos. 32884-32887

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BRANIFF AIRWAYS, INC., PHILLIP ADDABBO, and MORTON D. STEIN, as Executor of the Estate of Maurice Berg, deceased,

*Appellants,*

—v.—

CURTISS-WRIGHT CORPORATION,

*Appellee.*

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Before:

FRIENDLY, KAUFMAN and HAYS,

*Circuit Judges.*

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*On petition for Rehearing*

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WILBUR E. DOW, JR., New York, N. Y., *for appellants Braniff Airways, Inc., and Phillip Addabbo.*

*Second Opinion of United States Court of Appeals For the Second Circuit*

W. SHELBY COATES, JR., New York, N. Y., *for appellant Morton D. Stein as executor of the estate of Maurice Berg, deceased.*

JAMES F. COUGHLIN, New York, N. Y. (Mendes & Mount, New York, N. Y., Ernest D. Kennedy, of counsel), *for appellee Curtiss-Wright Corporation.*

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KAUFMAN, *Circuit Judge*:

Appellants petition for rehearing of our decision in *Braniff Airways, Inc., et al.* v. *Curtiss-Wright Corporation*, 411 F.2d 451 (2d Cir. 1969), claiming that a state court decision filed subsequent to ours requires us to change our interpretation of the pertinent state statute of limitations.

The facts are fully set forth in our main opinion and so we shall be content with a brief summary here. Curtiss Wright sold airplane engines on July 17, 1956 to Douglas Aircraft Corporation, who in turn sold them (installed in a DC-7C) to Braniff, on October 23, 1956. Two years later, on March 25, 1958, the plane crashed near Miami, Florida. Braniff instituted suit against Curtiss-Wright in the United States District Court for the Southern District of New York on March 21, 1960; Maurice Berg[1] and Phillip Addabbo, passengers on the plane, waited until December 23, 1963, and March 24, 1964, respectively, to file their suits. All three were consolidated for trial.

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[1] Berg died in the course of the litigation; his executor, Morton D. Stein, was substituted for him.

*Second Opinion of United States Court of Appeals For the Second Circuit*

The only portion of our prior opinion called into issue on this petition for rehearing is that dealing with the timeliness of claims of implied warranty, which all three plaintiffs raise. Sitting in a diversity action, we must apply the law of the forum state in matters of substantive law, including the state's conflict of laws doctrines. See *Klaxon* v. *Stentor Mfg. Co., Inc.*, 313 U.S. 487 (1941); *Sampson* v. *Channel*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940). New York, by statute, New York Civil Practice Law and Rules §202 (McKinney 1963),[2] provides that for causes accruing in another state, non-resident plaintiffs will be barred from instituting suit if they are barred by the statute of limitations of either jurisdiction; New York residents, however, will be affected only by the New York limitations period. Berg and Addabbo are New York residents; Braniff is considered a resident of its state of incorporation, Oklahoma. New York's six year limitation period runs from the date of sale. See CPLR §213(2) (McKinney 1963). Compare *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 215, 237 N.Y.S.2d 714, 716, 188 N.E.2d 142, 143, modified, 12 N.Y.2d 1073, 39 N.Y.S.2d 896, 190 N.E.2d 253, cert. denied, 374 U.S. 808 (1963) with *Flanagan* v. *Mount Eden General Hospital*, 24 N.Y.2d 427, 301 N.Y.S.2d 23, 248 N.E.2d 871 (1969). At the time of our decision on this appeal, relying on *Creviston* v. *General Motors Corp.*, 210 So.2d 755 (Fla. Dist. Ct. App. 1968),

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[2] §202. Cause of action accruing without the state
An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

we were of the view that Florida, like New York, applied its statute of limitations, which is three years, from the date of sale. Thus we held Braniff was barred by the Florida statute applicable by virtue of CPLR §202, and found Berg's and Addabbo's implied warranty claims untimely under the New York statute.

Our decision was filed on May 19, 1969, and a requested rehearing *en banc* was denied June 13, 1969. But in *Creviston* v. *General Motors Corp.*, 225 So. 2d 331, the Florida Supreme Court on July 2, 1969 reversed the intermediate appellate court decision on which we had relied, and held that the conflict in Florida lower court opinions over the accrual date in implied warranty cases should be resolved by computing the period from the time that the defect was, or should have been, discovered instead of the date of sale. Before considering the effect of the Florida Supreme Court's decision on our prior holding, we must first determine whether reconsideration of our original decision at this time is proper.

We note that the [defendant] filed a petition for certiorari on September 11, 1969 which was denied on December 8, 1969. 32 U.S.L.W. 3210. After certiorari was filed, but before it was denied, plaintiffs learned of the reversal in *Creviston* and filed a motion in this court styled a request for "modification of decision of the court or for enlargement of the time to petition for rehearing."

It seems clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired. See *United States* v. *Certain Land*, Docket Nos. 31181, 31182 (slip op. 3921) (2d Cir. Sept. 4, 1969) (deleting award of interest three months

after original decision). See also *National Comics Publishers* v. *Fawcett*, 198 F.2d 927 (2d Cir. 1952) (court of appeals may change and modify mandate of prior term). Accord, *United States* v. *63.04 Acres of Land*, 257 F.2d 68, 69 (2d Cir. 1958).

This Circuit has long shown considerable willingness to correct what it believed an erroneous interpretation of the law when an intervening state decision seemed to indicate a better view. See *Johnson* v. *Cadillac*, 261 F. 878 (2d Cir. 1919), following *McPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); (Cardozo, *J.*). In *Johnson* we modified, on appeal from a remand of the same case, a rule we had previously declared in remanding it, viewing the proper resolution of the controversy more important than rigid adherence to the law of the case. And in *Vanderbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) the Court directed courts of appeals sitting in diversity cases to follow new state court decisions occurring subsequent to the date of the district court judgment, but before the court of appeals decision.

Even more telling was the Court's action in *Huddleston* v. *Dwyer*, 322 U.S. 232 (1944), where it vacated a Court of Appeals decision for failing to consider a new state court opinion that (like *Creviston*) was handed down after the time for rehearing had expired. In *Huddleston*, the petitioners had sought a second rehearing some six months after entry of judgment, a period considerably longer than that before us. The Supreme Court indicated that so long as the case was *"sub judice"* the court of appeals should have entertained the petition for rehearing based on a change in state law; it did not indicate, however, precisely what the bounds of the term *"sub judice"* might be. Under

circumstances similar to *Huddleston*, we may consider petitions filed after rehearing has been denied, and even after the time to petition for rehearing has passed, see F.R.A.P. 40. The question we must determine is whether we should also entertain rehearings when a petition for certiorari already has been filed. *Huddleston* seems to indicate that we should. Instead of reversing the court of appeals, and deciding the state law issues itself, the Supreme Court there vacated the court of appeals decision, and remanded to that court to permit it to determine the issues of state law in the first instance, on the basis of the new state court decision. For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion. Hence we conclude that in the interests of justice we should consider what effect the Florida Supreme Court's decision in *Creviston* will have on our prior judgment in this case.[3]

First, Braniff's claim based on implied warranty is not barred as a matter of law in either Florida or New York, and so we reinstate that claim. See CPLR §202. The sales took place in 1956; suit was filed in 1960, making the action timely in New York. Assuming that the time of the crash (1958) was the first time that Braniff had notice of the

[3] *Lennig* v. *New York Life Ins. Co.*, 130 F.2d 580, 581 (3d Cir. 1942) suggests that a lower court on retrial may follow a state law rule different from the one relied upon in the federal court of appeals if there is an interim state court decision squarely in point. This would provide additional support for our decision to reconsider application of the *Creviston* rule, before remanding.

defect in the engines,[4] it also satisfied the Florida statute, since the Florida Supreme Court in *Creviston* indicated that its limitation period ran from the time when the party "discovered or should have discovered" the defect. 225 So.2d at 332.[5]

Berg's and Addabbo's claims are governed by the New York period of limitations, CPLR §202, and since both filed suit more than six years after the sale, they would ordinarily be barred by the New York period of limitations. See CPLR §213(2); *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 215, 237 N.Y.S.2d 714, 716, 188 N.E.2d 142, 143, modified, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, 190 N.E.2d 253, cert. denied, 374 U.S. 808 (1963). Plaintiff's urge, however, that we should apply the Florida time of accrual to the New York period of limitations, and thus find both Berg's and Addabbo's suits timely. Their argument, in effect, is that accrual should be governed by the law governing the substantive cause of action, here Florida. This "jurisdiction-selecting" approach and its mirror image, which demands that the period of limitations and its accompanying accrual date must be chosen from the same state, have been rejected by the New York Court of Appeals in favor of an approach that examines each issue, and evaluates and weighs the competing policies expressed in

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[4] Curtiss-Wright argues that Braniff had earlier notice of the defect in the engines, and that thus the statute of limitations has run even if measured from the time of discovery. That contention should be left for resolution at trial.

[5] The district court also appears, in the alternative, to have directed a verdict on the merits of Braniff's implied warranty claim. See 411 F.2d at 454. For the same reasons governing our reversal of a directed verdict on Braniff's negligence cause, 411 F.2d at 453, we believe that there was sufficient evidence to take the implied warranty claim to the jury.

each state's rule. See, e.g., *Long* v. *Pan American World Airways*, 16 N.Y.2d 337, 266 N.Y.S.2d 513 (1965).

There appear to be no New York decisions precisely in point on the limitations issue, at least since the conflicts-of-law trail blazers, *Kilberg* v. *Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961) and *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). Thus we must give flesh to the policy considerations that underlie each state's rule. The general aim of statutes of limitation is to cut short pursuit of stale claims; in New York a relaively long period of limitations is sharply cut back by the rule that the cause for implied warranty accrues at sale, and not at discovery of breach. The New York policy, we may reasonably infer, is to afford a litigant no more time to sue than that contemplated by the interplay of the two rules. The same may be said of Florida's shorter time limit, which is in effect extended by beginning computation at discovery rather than sale.

The effect of permitting Berg and Addabbo to apply the Florida accrual date to the New York period of limitations would be to create a hybrid period of limitations, longer than that available in either state. Given a strong policy in the forum state looking towards an extension of available remedies, cf. *Kilberg* v. *Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961), such a result might be permissible.[6] In the instant case, however, there is no such showing. Indeed, as suggested, we have no rea-

[6] In *Kilberg* the New York Court of Appeals did apply the New York rule on damages to the Massachusetts wrongful death statute, but Kilberg is clearly distinguishable. There the New York rule against limiting damages was an affirmative state policy; here there is no demonstrable or even speculative interest in extending the time to sue for accidents occurring outside the state, but not for those occurring within it.

son to believe that New York would choose to extend its already long period of limitations by permitting the Florida accrual at discovery rule to govern. Additional support for this conclusion may be derived from New York's own treatment of statutes of limitation that run from the time the facts could reasonably have been discovered rather than the date of the injury or agreement. Though called a "tolling" rather than an "accrual" provision, CPLR §203(f) limits the time within which suit may be brought to the longer of the usual period of limitations or two years from the actual or imputed discovery date, thus indicating a New York policy against adding a long statute of limitations (such as six years) to a cause that accrues at, or is tolled until, discovery.[7] Even if CPLR §203(f) were not thought

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[7] CPLR §203, Method of computing periods of limitation generally

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(f) Time computed from actual or imputed discovery of facts. Except as provided in Article 2 of the uniform commercial code, where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

As the New York statute indicates, provisions stating that the cause "accrues" at discovery (Florida), or that the statute of limitations is "tolled" until discovery (New York), are simply different verbal formulations intended to reach the same result. Hence it is instructive that the New York courts, when applying foreign statutes of limitation, also accept their tolling provisions *in toto*. See *Cellura* v. *Cellura*, 24 A.D.2d 59, 263 N.Y.S.2d 843 (1965). This suggests that New York would consider the Florida accrual at discovery rule (which is functionally identical to the New York tolling provision) intimately tied to its period of limitation, and would apply both to decide when the cause was extinguished.

by its terms to govern a foreign accrual date, its policy—cutting back the time limit when the statute is extended through nondiscovery—should show a legislative reluctance to permit the extension of the time to sue urged by plaintiffs here.

The petition to enlarge the time for filing a petition for rehearing, and for rehearing, is granted. Upon rehearing we adhere to our prior decision except that we reinstate Braniff's claim for implied warranty.

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HAYS, Circuit Judge (concurring and dissenting):

I agree with the majority's determination that reconsideration of our original decision at this time is required by the authorities and that Braniff's claim for implied warranty should be reinstated. However, I would also reinstate Berg's and Addabbo's claims for implied warranty.

The majority finds it "highly doubtful" that the New York courts would permit the Florida accrual at discovery rule to govern. I do not agree. The New York courts have rejected a mechanical jurisdiction selecting rule.

> "Justice, fairness, and 'the best practical result' . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation." *Babcock* v. *Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749 (1963) [citation omitted].

Florida has adopted its accrual rule to encourage the prevention of injury in that state caused by "the latently

defective condition of . . . product[s]," *Creviston* v. *General Motors Corp., Fla.* 225 So.2d 331, 333 (1969), and to deal with a well-founded sense of outrage that because of "blameless ignorance" (*id.* at 334) plaintiffs should go uncompensated for invasions of their legal rights.

Thus Florida, by its accrual at discovery rule, has placed a greater burden than has New York[1] on manufacturers who may cause injury within that state. The additional standard of care imposed by Florida is not unlike a "rule of the road" about which the court in *Babcock* said:

> "In such a case, it is appropriate to look to the law of the place of the . . . [injury] so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place." 12 N.Y.2d at 483, 240 N.Y.S.2d at 750-51.

The time of sale rule is applied grudgingly by the New York courts. See *Schwartz* v. *Heyden Newport Chemical Corp.*, 12 N.Y.2d 212, 217-19, 237 N.Y.S.2d 714, 717-19 (dicta) (and dissenting opinion of Chief Judge Desmond, 12 N.Y.2d at 219, 237 N.Y.S.2d at 719), modified, 12 N.Y.2d 1073, 239 N.Y.S.2d 896, cert. denied, 374 U.S. 808 (1963). An exception has recently been fashioned by the Court of Appeals. *Flanagan* v. *Mount Eden General Hospital*, 24 N.Y.2d 427, 301 N.Y.S.2d 23 (1969). In the light of their dissatisfaction with the time of sale rule, the New York courts would be likely to welcome an opportunity to avoid

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[1] The longer period of limitations in New York only partly compensates for its rule of accrual at the time of sale. In many instances a latent defect may not be discovered until more than six years after the product has been sold.

extending that rule, while at the same time taking proper account of Florida's legitimate interests.

The cases cited by the majority to show that, when the New York courts apply a foreign statute of limitations, they also apply the pertinent foreign tolling provision are not relevant to the present problem. A tolling provision is closely akin to a statute of limitations—indeed an integral part of such a statute. The time an action accrues imports "notions of substantive law," 1 Weinstein-Korn-Miller, New York Civil Practice §203.01, at 2-39.2 (1969). See *First Nat'l Bank* v. *Marcher*, 179 Misc. 258, 38 N.Y.S.2d 774 (Sup. Ct. 1942); *Bicknell* v. *Central Hanover Bank & Trust Co.*, 169 Misc. 7, 6 N.Y.S.2d 704 (Sup. Ct.), aff'd 255 App. Div. 956, 8 N.Y.S.2d 668 (1st Dep't 1938); *Zuck* v. *Interstate Publishing Corp.*, 317 F.2d 727, 735 (2d Cir. 1963); *Baron Tube Co.* v. *Transport Ins. Co.*, 365 F.2d 858, 860 (5th Cir. 1966).[2]

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[2] Section 203(f) of the New York Civil Practice Act and Rules would be irrelevant even if the New York rule as to accrual date were to be applied.

## Note Regarding Missing Documents

Petitioners' counsel have been unable to locate the originals or copies of the judgment entered on May 19, 1969 by the Court of Appeals and the order entered on April 16, 1970 by the Court of Appeals. The missing judgment may be part of the record certified to the Supreme Court of the United States on July 28, 1969 in connection with respondent's Petition for a Writ of Certiorari filed on September 11, 1969. The office of the Clerk of the Court of Appeals for the Second Circuit has advised petitioners' counsel that the missing order may have been misfiled. Petitioners' counsel will continue to try to trace the missing documents.